NO. 48753-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TEHL DUNLAP,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

When Tehl Dunlap was assigned indigent defense counsel, his attorney made an administrative request to the court to authorize funds to perform his constitutionally mandated obligation to investigate Mr. Dunlap's case. Shortly after, Mr. Dunlap filed an affidavit of prejudice against the superior court judge assigned to his case. The court rejected his motion, stating that the authorization of funds was a discretionary ruling. Mr. Dunlap also asked the court to recuse itself because the court had acted as an attorney in a case where the person was convicted of assaulting Mr. Dunlap.

Recusal was appropriate under RCW 4.12.505(1) because Mr. Dunlap satisfied the conditions required for filing an affidavit of prejudice. It was also appropriate to avoid an appearance of impartiality under the appearance of fairness doctrine.

In his closing argument, the prosecutor acknowledged the multiple incidents of assault which had occurred during the course of the night where the State alleged Mr. Dunlap had assaulted Jeaneal Thompson. The State encouraged the jury to use any of the alleged assaults to find Mr. Dunlap guilty. The jury was not, however, instructed on unanimity. This error requires reversal of this charge.

B. ASSIGNMENTS OF ERROR

1. Mr. Dunlap's affidavit of prejudice was improperly denied where the court found it had made a discretionary ruling authorizing funds for constitutionally required investigative services.

2. The trial court violated the appearance of fairness doctrine where it declined to recuse itself after being requested to do so by Mr. Dunlap because of the court's prior representation of a person convicted of assaulting Mr. Dunlap.

3. The trial court failed to properly instruct the jury on the requirement of unanimity with respect to the charge of assault in the fourth degree.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Recusal is required where an affidavit of prejudice is served upon the court. It may only be properly denied where the court has made a prior discretionary ruling. Was the denial of Mr. Dunlap's affidavit of prejudice warranted where the basis for the denial was the administrative authorization of funds to fulfill the constitutionally mandated obligation defense attorneys have to investigate their cases?

2. The appearance of fairness doctrine requires recusal where the impartiality of the court might reasonably be questioned. Recusal is

required unless a reasonably prudent and disinterested person would conclude all parties obtained a fair, impartial, and neutral hearing. Was recusal required where the trial judge had represented a person convicted of assaulting Mr. Dunlap?

3. Where multiple acts which could form the basis for a conviction are alleged, the State must elect which act forms the basis for a conviction, or the jury must be instructed upon the requirement of unanimity. Is reversal required where the State does not elect which acts formed the basis for a conviction for assault in the fourth degree and no unanimity instruction is provided to the jury?

D. STATEMENT OF THE CASE

1. Tehl Dunlap and Jeaneal Thompson had an "on and off" sexual relationship.

Tehl Dunlap and Jeneal Thompson had been in an "on and off" relationship with each other for some time before August 28, 2015. RP 287.[1] They had been in a steady relationship until it ended in March or April, 2015. RP 102. Ms. Thompson recognized, however, they were

[1] The transcript of the trial is largely sequential. Where it is sequential, counsel will refer to the record using RP. The only non-sequential transcript is dated 11/5/15. Counsel will refer to this transcript using that date and RP. E.g., 11/5/15 RP 1. Documents referred to as Sub. No. have been submitted as to be designated as clerk's papers.

still "sleeping with each other and hanging out" in August, 2015. RP 288.

On August 28, Mr. Dunlap and Ms. Thompson texted each other while she spent time riding horses with her friend, Aaron Malone.[2] RP 98, 81. Although Ms. Dunlap described Mr. Malone as her "brother," he was actually a friend from her childhood who she had not seen for about four years because of his drug problems. RP 96, 171-72.

While Ms. Thompson was with Mr. Malone, she began to have a conversation via text message with Mr. Dunlap. RP 103. Ms. Thompson claimed Mr. Dunlap became jealous of the time she was spending with Mr. Malone. RP 235.

Mr. Malone then began to use Ms. Thompson's phone to text with Mr. Dunlap. RP 105. He continued to text with Mr. Dunlap after he and Ms. Thompson returned to Frank's Hideaway. RP 108. Mr. Malone did not give the phone back to Ms. Thompson until they returned to Frank's Hideaway. RP 105.

[2] Aaron Malone was only identified by his last name in the prosecutor's opening statement. During the course of the trial he was only ever referred to by his first name.

2. *Mr. Dunlap and Ms. Thompson drove around Lewis County to try to find Mr. Thompson's friend Aaron Malone after he had left the tavern where Mr. Malone and Ms. Thompson had been drinking exchanging in a verbal altercation with Mr. Dunlap.*

After horseback riding, Ms. Thompson went with Mr. Malone to Frank's Hideaway, which is a tavern located in Winlock, Washington. Mr. Dunlap and Mr. Malone continued to have a heated text conversation, until Mr. Malone sent Mr. Dunlap a text telling him to come to the tavern to have further words with Mr. Malone. RP 111, 178. Mr. Dunlap met Ms. Thompson and Mr. Malone at the tavern, where Mr. Dunlap and Mr. Malone began to have a verbal altercation. RP 111. According to Ms. Thompson, Mr. Malone was about to beat Mr. Dunlap up. RP 111. The bartender asked Mr. Dunlap and Mr. Malone to stop arguing. They went outside and had words again. RP 113. They were again asked to stop their conflict. RP 113. Mr. Malone left Frank's, telling Ms. Thompson he was going to walk home. RP 113.

Ms. Thompson had gotten very intoxicated. RP 109. She was not fit to drive and was "slurring," "stumbling," and getting "a little blurry." RP 110. While she was sitting outside with Mr. Dunlap smoking a cigarette, Mr. Dunlap offered to take Ms. Thompson to find

her friend, who she believed was staying at a local trailer park. RP 118. Mr. Dunlap offered to use his truck, provided Ms. Thompson pay for the gas. RP 118, 125.

3. Multiple arguments and fights between Mr. Dunlap and Ms. Thompson occurred while they drove around Lewis County.

While Mr. Dunlap and Ms. Thompson were in the truck, they began to argue. RP 129. Ms. Thompson claimed they were on the roads of Lewis County for over an hour. RP 137. This was consistent with the bartender's estimation. RP 224. During that time, they had several fights. Mr. Dunlap struck Ms. Thompson when she tried to get out of the truck. RP 132. When Ms. Thompson tried to pull the keys out of the ignition, Mr. Dunlap "put [her] head into the dash." RP 152. The two continued to fight, with Ms. Thompson trying to jam the gear box of the truck. RP 143. Mr. Thompson took Ms. Dunlap's phone from her and dropped it out the window, damaging the phone as a result. RP 129.

After driving around Lewis County, Mr. Dunlap took Ms. Thompson back to Frank's Hideaway. Ms. Thompson began throwing Mr. Dunlap's things out of the truck. RP 151. Angry that Ms. Dunlap was throwing his things out of his truck, Mr. Dunlap pulled at Ms. Thompson's hair and pulled her towards the truck's seat. RP 151. She

finally returned to Frank's Hideaway, where she spoke to the bartender and alerted the police about what had happened to her. RP 152.

4. *An affidavit of prejudice filed by Mr. Dunlap was denied because the court found it had made a discretionary ruling in authorizing funds for an investigator.*

Mr. Dunlap was charged with kidnapping in the first degree, and a single count of assault in the fourth degree on October 6, 2015. CP 1-3. On October 29, 2015, Mr. Dunlap's attorney made an administrative request for investigative funds to perform his constitutionally mandated obligation to investigate his case. 11/5/15 RP 2; *see also* Sub. No. 14. Mr. Dunlap subsequently filed an affidavit of prejudice against Judge Hunt on October 31, 2015. CP 6.

5. *The Court denied Mr. Dunlap's motion for recusal which was based upon the judge's representation in an incident where the person the judge represented was convicted of assaulting Mr. Dunlap.*

Mr. Dunlap requested Judge Hunt recuse himself based upon the appearance of fairness doctrine because Judge Hunt had acted as an attorney in a trial where the person he had represented was convicted of assaulting Mr. Dunlap. 11/5/15 RP 3. Judge Hunt declined, stating he had had little memory of the trial where Mr. Dunlap had been assaulted and that his representation of the person who had assaulted Mr. Dunlap was over ten years ago. 11/5/15 RP 4. Judge Hunt could not recall the

prior case well but did remember it had been a trial and that it was a "pretty severe case of an assault." 11/5/15 RP 3.

6. No unanimity instruction was provided to the jury despite the recognition by the State that Mr. Dunlap's conduct constituted multiple acts of assault.

At trial, the State added the additional charges of unlawful imprisonment and malicious mischief in the third degree. CP 7-9.

The prosecutor recognized that there were multiple, distinct acts of assault from which the jury could choose to convict Mr. Dunlap of assault. RP 410. In his closing, the prosecutor stated:

> there's a whole bunch of them you can pick from here. There were a lot of assaults that happened here, okay.

RP 410.

Mr. Dunlap denied some of the allegations and asserted a justification defense, stating he acted in self-defense with regard to some of the other acts. RP 324. He stated he was fearful of what Ms. Thompson was going to do and that he acted to "defend myself and defend my truck, keep us from wrecking." RP 324.

Although multiple acts of assault had been alleged and argued at trial, the jury was not instructed on unanimity.

Mr. Dunlap was convicted of unlawful imprisonment and assault in the fourth degree. He was acquitted of kidnapping and malicious mischief. RP 429, CP 44-48.

7. The trial court determined Mr. Dunlap to be indigent for purposes of his appeal.

On appeal, Mr. Dunlap was deemed to be indigent. Mr. Dunlap stated in his request for indigent counsel that he supported two children, had no assets other than a 1991 Chevy truck and had fixed expenses in excess of $950 against an income of $2,200 a month. Sub. No. 52. When the court found him indigent for purposes of his appeal, Mr. Dunlap had worked for two weeks as a laborer for True Craft Construction. Sub. No. 52.

E. ARGUMENT

1. RECUSAL BASED UPON MR. DUNLAP'S AFFIDAVIT OF PREJUDICE WAS IMPROPERLY DENIED.

a. A superior court judge must be recused where a party files an affidavit of prejudice against that judge.

"No judge of a superior court ... shall sit to hear or try any action or proceeding when it shall be established ... that said judge is prejudiced against any party or attorney." RCW 4.12.040(1). The affidavit of prejudice rule is a mandatory, nondiscretionary rule

allowing a party in a superior court proceeding the right to one change of judge upon the timely filing of an affidavit of prejudice under RCW 4.12.050. *State v. Dennison*, 115 Wn.2d 609, 619, 801 P.2d 193 (1990).

When the statutory requirements of RCW 4.12.505(1) are met, a party need not substantiate a claim or show prejudice. *State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007). Instead, prejudice is established where the party files a motion supported by an affidavit indicating that the party "cannot" or "believes" that it cannot "have a fair and impartial trial before such judge." RCW 4.12.050(1).

An affidavit of prejudice cannot be filed where the judge subject to the affidavit of prejudice has already made a discretionary ruling. RCW 4.12.050(1). Many rulings made by a court are not discretionary. Where a certain action or result follows as a matter of right upon a mere request, the exercise of discretion is not involved. *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 578, 754 P.2d 1243 (1988); *see also State v. Dixon*, 74 Wn.2d 700, 702, 446 P.2d 329 (1968). Rather, the court's discretion is invoked only where, in the exercise of that discretion, the court may either grant or deny a party's request. *Id.*

b. Authorization of funds for a defense investigator at public expense for an indigent defendant is not a discretionary ruling.

Mr. Dunlap filed an affidavit of prejudice against Judge Hunt on October 31, 2015. CP 6. Before the court ruled upon Mr. Dunlap's motion for recusal the court performed only administrative tasks or those excluded from RCW 4.12.050, such as Mr. Dunlap's first appearance. Nonetheless, the trial court denied Mr. Dunlap's affidavit of prejudice because the court found it had made a discretionary ruling in authorizing funds for an investigator on October 29, 2015. 11/5/15 RP 2; *see also* Sub. No. 14. Mr. Dunlap objected, stating the approval was only administrative, and not a discretionary ruling. 1/5/15 RP 5.

The obligation to provide effective assistance requires defense counsel to either investigate their client's case or make a reasonable decision that an investigation is unnecessary. *In re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992) (citing *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). This duty has been incorporated into Washington's *Standards for Indigent Defense*, which require defense attorneys to investigate their client's cases and use investigation services as appropriate. *See* Washington State Supreme Court, *Standards of Indigent Defense Service*s, Standard 6.1

(2011); *see also* American Bar Association, *Standards for Criminal Justice*, 4-4.1 and 5-1.14; National Legal Aid and Defender Association, *Standards for Defender Services*, Standard IV-3.

The failure to investigate, when coupled with other defects, can amount to ineffective assistance of counsel. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 879–80, 16 P.3d 601 (2001). Without investigation, an attorney cannot properly evaluate their client's case. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (citing *State v. Cameron*, 30 Wn. App. 229, 232, 633 P.2d 901 (1981). As a result, the requirement defense attorneys investigate their client's cases exists even where defense counsel believes their client is going to plead guilty. *A.N.J.*, 168 Wn.2d 91, 110, 225 P.3d 956 (2010) (citing *State v. S.M.*, 100 Wn. App. 401, 413, 996 P.2d 1111 (2000)), *see also* RPC 1.1. And while the degree and extent of the investigation may vary, the obligation to investigate is necessary so that counsel may reasonably evaluate the State's evidence and the likelihood of conviction before a case proceeds to trial. *A.N.J.*, 168 Wn.2d at 111-12; *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012); *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012).

Authorizing funds for an investigator is therefore not a discretionary ruling. Instead, it is an administrative ruling required to ensure defense counsel provides effective assistance of counsel. Appointed counsel has a constitutional obligation to investigate their client's cases. *A.N.J.*, 168 Wn.2d at 110. As Washington's Supreme Court recognized in *A.N.J.*, the United States Supreme Court has also affirmed that the Sixth Amendment right to effective assistance of counsel includes expert assistance necessary to an adequate defense. *See Ake v. Oklahoma*, 470 U.S. 68, 72, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

c. Mr. Dunlap's properly filed affidavit of prejudice should have resulted in Judge Hunt's recusal.

When Mr. Dunlap applied for funds for an investigator, he did so without a hearing. The trial court heard no argument from Mr. Dunlap as to why the funds were appropriate. The trial court asked for no further information. No declarations or affidavits were filed. Instead, the court signed the order offered by Mr. Dunlap.

This administrative task should not have acted as a barrier to Mr. Dunlap's affidavit of prejudice. Because the Court was only asked to act in its administrative function, it did not exercise its discretion

before Mr. Dunlap filed his affidavit of prejudice. Because the affidavit was timely filed, the court should have recused itself.

Mr. Dunlap's request for an investigator cannot be described as a discretionary ruling. Because Judge Hunt had not made a discretionary ruling before Mr. Dunlap filed his affidavit of prejudice, recusal was required. The failure of the trial judge to recuse himself requires reversal.

2. RECUSAL WAS REQUIRED WHERE MR. DUNLAP REQUESTED RECUSAL BASED UPON AN APPEARANCE OF IMPARTIALITY.

a. Due process requires judges to recuse themselves where their impartiality might be questioned.

The right to a fair tribunal is a basic tenant of due process. *In re Murchison*, 349 U.S. 133, 136 (1955); U.S. Const. amend. XIV. "Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge." *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972); *see also* Code of Judicial Conduct Canon 2.11.

Washington's appearance of fairness doctrine not only requires a judge to be impartial, but also requires that the judge appear to be impartial. *Tatham v. Rogers*, 170 Wn. App. 76, 80, 283 P.3d 583

(2012) (citing *State v. Finch*, 137 Wn.2d 792, 808, 975 P.2d 967 (1999)). The appearance of fairness doctrine provides that "judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned." *Sherman v. State*, 128 Wn.2d 164, 188, 905 P.2d 355 (1995) (citing former Code of Judicial Conduct Canon 3(C)). "It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties." *Diimmel v. Campbell*, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966). Where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating. *Sherman*, 128 Wn.2d at 205.

The test for determining whether a judge's impartiality might reasonably be questioned is an objective test that assumes that "'a reasonable person knows and understands all the relevant facts.'" *Sherman*, 128 Wn.2d at 206 (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988), *cert. denied*, 490 U.S. 1102 (1989)). Actual prejudice is not required to determine whether recusal is warranted. Instead, "a mere suspicion of partiality" may be enough to warrant recusal because "the effect on the public's confidence in our judicial system can be debilitating." *Sherman*, 128 Wn.2d at 205.

Unless a reasonably prudent and disinterested person would conclude all parties obtained a fair, impartial, and neutral hearing, recusal is required. *Tatham*, 170 Wn. App. at 96; *see also State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (citing *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995)). "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Madry*, 8 Wn. App. at 68 (quoting *Murchison*, 349 U.S. at 136).

b. The trial judge's prior representation of the person who had assaulted Mr. Dunlap violated the appearance of fairness doctrine and should have resulted in recusal.

Judge Hunt should have recused himself because of his advocacy on behalf of a person who had assaulted Mr. Dunlap. Judge Hunt was an attorney when he represented this person. 11/5/15 RP 3. When Mr. Dunlap asked Judge Hunt to recuse himself, Judge Hunt declined stating he had had little memory of the trial and that his representation of the person was over ten years ago. 11/5/15 RP 4. Judge Hunt could not recall the prior case well but did remember it had been a trial and that it was a "pretty severe case of an assault." 11/5/15 RP 3.

A reasonably prudent and disinterested observer could conclude Judge Hunt's prior representation of the person who had assaulted Mr. Dunlap violated the appearance of fairness doctrine. Judge Hunt's representation at trial of this created an appearance of impartiality. When Mr. Dunlap recognized this potential bias and requested Judge Hunt recuse himself, it was incumbent upon Judge Hunt to recuse himself. The failure to recuse himself was a violation of Mr. Dunlap's due process.

3. THE FAILURE OF THE STATE TO ELECT WHICH CONDUCT CONSTITUTED AN ASSAULT WHERE NO UNANIMITY INSTRUCTION WAS PROVIDED TO THE JURY REQUIRES REVERSAL.

a. Where multiple acts which could form the basis for a conviction are alleged, the State must elect which act forms the basis for a conviction, or the jury must be instructed upon the requirement of unanimity.

"Criminal defendants in Washington have a right to a unanimous jury verdict." *State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); *see also State v. Kitchen*, 110 Wn.2d 403, 405–06, 756 P.2d 105 (1988). When the State presents evidence of multiple acts that could each form the basis of one charged crime, "either the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific

criminal act." *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). This requirement "assures a unanimous verdict on one criminal act" by "avoid[ing] the risk that jurors will aggregate evidence improperly." *Id.* at 512. "Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to result in prejudice." *Id.* at 512.

Failure to follow one of these options is "violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial." *Kitchen*, 110 Wn.2d at 409; Const. art. I, § 22; U.S. Const. amend VI. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." *Kitchen*, 110 Wn.2d at 411.

Reversal is required unless this Court determines the error is harmless beyond a reasonable doubt. *Coleman*, 159 Wn.2d at 512. The error is presumed prejudicial and will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether each alleged act established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411. If there was conflicting testimony as to any of the alleged acts, or a rational juror could have entertained reasonable doubt

as to whether one or more of them actually occurred, the conviction must be reversed. *Id.* at 412.

Failure to provide a unanimity instruction when required is a manifest constitutional error that may be raised for the first time on appeal. *State v. Moultrie*, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3).

b. No unanimity instruction was given and the State failed to elect which conduct constituted an assault.

Mr. Dunlap was charged with a single count of assault in the fourth degree. In his closing, the prosecutor recognized that

> there's a whole bunch of them you can pick from here. There were a lot of assaults that happened here, okay.

RP 410.

Despite this acknowledgement, the jury was not instructed on unanimity.

The State was correct in its assessment of the conduct. Ms. Thompson had alleged multiple assaults, separated in time and with different motives. Additionally, Mr. Dunlap had offered separate defenses to the assaults, alleging some had not occurred and that he was justified in his actions with regard to others. RP 324.

Mr. Dunlap denied some of the allegations Ms. Thompson made. For example, Mr. Dunlap denied ever attempting to put out a cigarette in Ms. Thompson's hair or on her person. RP 317. The police officer who testified stated he saw no evidence of a cigarette burn. RP 250. The fights between Mr. Dunlap and Ms. Thompson took place over an extended time and were not a continuous act.

Mr. Dunlap also believed he acted in self-defense with regard to other conduct. Mr. Dunlap stated it was necessary to grab her to prevent the car he was driving from crashing. RP 353. He also argued it was later necessary to grab her because she was trying to throw his wallet out the window of his car. RP 364. These actions were necessary to protect himself and his property. RP 324.

c. The error was not harmless beyond a reasonable doubt.

The failure to instruct the jury on unanimity is not harmless beyond a reasonable doubt. Mr. Dunlap offered multiple defenses to the State's evidence. With regard to some conduct, Mr. Dunlap denied it had occurred. With regard to other conduct, he stated he acted in self-defense. Without a unanimity instruction, this Court cannot have confidence the jury was unanimous with regard to the assault charge. As a result, this court should reverse this conviction.

4. THE COSTS OF THIS APPEAL SHOULD NOT BE IMPOSED BECAUSE MR. DUNLAP CONTINUES TO BE INDIGENT.

The Washington Supreme Court addressed the dire consequences of imposing legal financial obligations upon persons who cannot afford to pay them in *City of Richland v. Wakefield*, ___ P.3d ___, 92594-1, 2016 WL 5344247, at *5 (Wash. Sept. 22, 2016). In reversing the Court of Appeals decision on whether Ms. Wakefield was entitled to remittance of her legal financial obligations, the Supreme Court recognized "the particularly punitive consequences of LFOs" for indigent individuals: "'[O]n average, a person who pays $25 per month toward their LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed.'" *Wakefield*, 2016 WL 5344247, at *5 (quoting *State v. Blazina*, 182 Wn.2d 827, 836, 344 P.3d 680 (2015)). The imposition of costs against indigent defendants raises problems that are well documented and include "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wn.2d at 839.

"Washington's LFO system carries problematic consequences." *Blazina*, 182 Wn.2d at 836. Unpaid costs from a criminal conviction

increase recidivism for indigent offenders because they "accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time"; an impoverished person is far more likely to accumulate astronomical interest than a wealthy person who can pay the costs in a timely manner; and "legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs," which may "have serious negative consequences on employment, on housing, and on finances." *Id.* (internal citations omitted). "LFO debt also impacts credit ratings, making it more difficult to find secure housing." *Id.* (citing Katherine A. Beckett, Alexes M. Harris & Heather Evans, Wash. State Minority & Justice Comm'n, *The Assessment and Consequences of Legal Financial Obligations in Washington State* (2008) at 43).

Appellate court costs are among the highest legal financial obligations a court can impose. In *State v. Sinclair*, for example, the assessed costs of the appeal were nearly $7,000. 192 Wn. App. 380, 388, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). Unlike most legal financial obligations, there is no limit to how high this legal financial obligation can be. RAP 14.3. The costs imposed in *Sinclair* are not an anomaly and are instead consistent with costs imposed in

many other cases where an indigent appellate does not prevail. *See, e.g., State v. Nolan*, 141 Wn.2d 620, 622, 8 P.3d 300 (2000) (where court imposed an additional $3,400 in legal financial obligations).

The *Wakefield* court reiterated its instruction from *Blazina* that "courts can and should use GR 34 as a guide for determining whether someone has an ability to pay costs." *Wakefield*, 2016 WL 5344247, at *4. GR 34 states that "courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline." *Blazina*, 182 Wn.2d at 838–39. Wakefield makes clear this requirement applied to both imposition and enforcement. *Wakefield*, 2016 WL 5344247, at *4.

Mr. Dunlap's household income falls slightly above 125 percent of the federal poverty guidelines. At the time he filed his Notice of Appeal, Mr. Dunlap had been working for two weeks as a laborer. Mr. Dunlap supports two children and has no assets other than a 1991 Chevy truck. He has fixed expenses in excess of $950 against an income of $2,200 a month.

Should this Court reject Mr. Dunlap's argument, it should not order Mr. Dunlap to pay the additional legal financial obligations associated with the costs of an appeal. If this Court is inclined to order

Mr. Dunlap to pay these additional costs, Mr. Dunlap requests that this Court remand this matter to trial court to determine whether Mr. Dunlap has an ability to pay these additional court costs. Should the trial court find he lacks the ability to pay the costs of his appeal, they should not be imposed.

F. CONCLUSION

Mr. Dunlap asks this Court to order reversal because of the failure of the trial court to properly recuse itself. Recusal was required because Mr. Dunlap complied with the requirements for filing an affidavit of prejudice. It was also required because the trials judge's prior representation of a person in a case where his client was convicted of assaulting Mr. Dunlap violated the appearance of fairness doctrine.

Mr. Dunlap also asks this Court to reverse his conviction for assault in the fourth degree. While the State argued there were multiple assaults which occurred during the charging period, it failed to elect which one constituted the charged assault and no unanimity instruction was provided to the jury.

Finally, should Mr. Dunlap not substantially prevail in his appeal, he asks that this court find he cannot pay the costs of appeal or

remand the matter to trial court to determine whether he has the ability to pay the additional legal financial obligations.

DATED this 26th day of October 2016.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. TEHL DUNLAP, Appellant.	)))))))))	NO. 48753-5-II

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